APPENDIX

ORDER OF THE DISTRICT COURT GRANTING WRIT OF HABEAS CORPUS

Gerald H. Scarpelli has filed a petition for writ of habeas corpus pursuant to §2241, et seq., Title 28, United States Code of Laws. The petition challenges the legality of the procedure used to revoke his probation. The petitioner's probation was revoked by the Wisconsin State Department of Public Welfare without affording the petitioner a hearing. The petitioner claims that this action taken against him is in violation of both the due process and equal protection clauses of the Fourteenth Amendment. For the reasons set forth below, I have concluded that the revocation of petitioner's probation without a hearing was impermissible and that, therefore, the petition for writ of habeas corpus must be granted subject to the special conditions set forth at the conclusion of this opinion.

FACTS

On July 9, 1965, the petitioner, upon entering a plea of guilty, was convicted of armed robbery in violation of § 943.32 (1) (b) (2), Wisconsin Statutes, in the County Court of Racine County, Wisconsin. The petitioner was sentenced on that date to an indeterminate term of not more than fifteen years at the Wisconsin State Reformatory, Green Bay, Wisconsin. However, execution of the sentence was stayed and the petitioner was placed on probation to the State Department of Public Welfare for a period of seven years.[1] On the same date, the petitioner signed a "Parole Agreement and a Travel Permit and Agreement to Return" and was allowed to return to Illinois which was, at that time, his home. Pursuant to the Uniform Act for out-of-state parolee supervision,[2] the Adult Probation Department of the Circuit Court of Cook County, Illinois, accepted the probation supervision responsibilities over the petitioner.

On August 20, 1965, the petitioner's probation supervisor recommended to the State Department of Public Welfare in Wisconsin that the petitioner's probation be revoked due to his alleged association with known criminals and his alleged involvement in a burglary. On the same day, the district administrator in Wisconsin concurred in the recommendation of revocation. On August 27, 1965, the chief of Probation and Parole Services also concurred in the recommended revocation of the petitioner's probation. On September 1, 1965, an order revoking the petitioner's probation was signed by Wilbur Schmidt, the Director of the Wisconsin State Department of Public Welfare.

On September 3 or 4, 1965, the petitioner was picked up at his place of employment in Illinois and transported to the sheriff's office in Niles, Illinois. Later in the same day, he was transported to the Racine County jail and held overnight. On September 5, 1965, he was transported to and received at the Wisconsin State Reformatory in Green Bay, Wisconsin.

It is undisputed that the petitioner did not at any time receive notice or a hearing of any kind pursuant to the revocation of his probation.

It appears from the record in this case that the petitioner was arrested on August 5, 1965, in Deerfield, Illinois, for burglary. The record also contains in this regard an unsigned statement allegedly given by the petitioner to Robert J. Smart, Assistant State's Attorney, Cook County, Illinois, which, if true and valid, could fairly be construed as a confession to the burglary on August 5, 1965. It further appears from the record that the petitioner was referred to in newspaper articles in the Chicago Tribune concerning the alleged burglary in Deerfield on August 5, 1965.

The petitioner maintains that he is innocent of the burglary charges from Deerfield (which were apparently dropped subsequent to the revocation of his probation) and could have

proven his innocence in court. He contends further that he should have been provided an opportunity to explain and answer the allegations about his involvement in the alleged burglary which he maintains were the basis of the revocation of his probation, but that he was not afforded any hearing in which he could answer the allegations made against him.

At the time of filing his petition for writ of habeas corpus, the petitioner was an inmate in a Wisconsin State correctional institution. However, on June 4, 1969, subsequent to filing the instant writ, the petitioner was released from prison in Wisconsin and was paroled to a federal detainer. The petitioner had previously been sentenced to a term of eight years pursuant to a federal conviction. The petitioner is thus currently a parolee of the State of Wisconsin, incarcerated in a federal prison in Terre Haute, Indiana.

ISSUES

The respondent does not contend that the present petition is moot or that this court lacks jurisdiction to consider it by virtue of the fact that petitioner was paroled from prison in Wisconsin subsequent to filing this petition for writ of habeas corpus. I have concluded that the petition is not moot and that this court has jurisdiction to consider it. The petitioner's parolee status is sufficient "custody" for the purpose of § 2241, et seq., and this court's jurisdiction. The possible adverse effects of the petitioner's probation revocation are sufficiently important "collateral consequences" to save the petition from mootness although the petitioner is no longer technically incarcerated by virtue of the probation revocation. See *Sibron v. New York*, 392 U. S. 40, 50-55 (1968); *Carafas v. LaVallee*, 391 U. S. 235, 237-40 (1968); *Jones v. Cunningham*, 371 U. S. 236 (1963); *Hahn v. Burke*, F. 2d

(No. 17938, Aug. 19, 1970, 7th Cir.); and *Hewett v. North Carolina*, 415 F. 2d 1316, 1320-21 (4th Cir. 1969).

The petitioner's first contention is that the due process clause of the Fourteenth Amendment and the "fundamental principles of liberty and justice" which flow from the due process clause require that a probationer be given notice and hearing prior to the revocation of his probation.

The issue of the necessity of a hearing prior to probation revocation has been the subject of an increasing volume of commentary.[3]

On August 19, 1970, the United States Court of Appeals for the Seventh Circuit decided the case of *Hahn v. Burke*, supra. The *Hahn* case involved an appeal from a district court denial of a petition for writ of habeas corpus. In *Hahn*, one of the petitioner's contentions on appeal was that the revocation of his probation[4] without a hearing violated his constitutional rights.

The Seventh Circuit found that the revocation of the petitioner's probation without affording him a hearing was violative of "the basic requirements of due process." In reaching its decision, the *Hahn* court considered the bases which had been utilized by other courts to reach a contrary conclusion that a hearing before probation revocation was *not* required. Since similar arguments are urged by the respondent in this case, it is worth noting how the *Hahn* court treated these issues. Regarding the "privilege-right" distinction, the Court said:

> "* * * While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court, *see Escoe v. Zerbst*, 295 U. S. 490 (1935), essential procedural due process no longer turns on the distinction between a privilege and a right. *See Goldberg v.*

Kelly, 38 U. S. L. W. 4223, 4225 (May 23, 1970); *Shapiro v. Thompson*, 394 U. S. 618, 627 n. 6 (1969); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Slochower v. Board of Education*, 350 U. S. 551 (1956). *See also* Von Alstyne, *The Demise of the Right–Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1967-8)." Id., at .

With regard to the argument that probation is a form of contract, a condition of which is the waiver of right to a hearing, the *Hahn* Court disagreed saying:

> "* * * Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state. * * *"

The Court then quotes from Judge Celebrezze's dissenting opinion in *Rose v. Haskins*, 388 F. 2d 91, 100 (6th Cir. 1968), wherein Judge Celebrezze stated:

> "* * * if the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to a hearing), then that theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the 'choice' of the parolee is to remain in prison or accept such a burdensome provision, the 'choice' to accept parole can hardly be termed a voluntary waiver of the right to a hearing. * * *"

The Court in *Hahn*, in finding that due process dictated a hearing prior to probation revocation, referred to the recent United States Supreme Court case of *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that welfare recipients have a constitutional right to a hearing before termination of public assistance benefits. As noted in the *Hahn* opinion, the Supreme Court in *Goldberg* stated at page 262:

"* * * The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring) and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. * * *"

Noting the fact that what was at stake in a probation revocation was a man's liberty, the Seventh Circuit in *Hahn* stated:

"* * * Weighing the 'extent to which he [the petitioner] may be "condemned to grievous loss" ' against 'the governmental interest in summary adjudication' we find the petitioner's loss of freedom to outweigh the added state burden of providing a limited hearing to allow petitioner to be confronted with his probation violation and to be heard.

"The state need not grant probation, but if it does so, it should not be able to arbitrarily revoke such probation without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions upon which his probation was granted. * * * When the state created conditions of probation it impliedly agreed to continue petitioner's probation as long as the conditions were satisfied. To allow the state to summarily revoke the petitioner's probation without a hearing to determine if the conditions upon which the probation was granted have been violated, is state action inconsistent with the due process guarantees of the fourteenth amendment."

The decision in *Hahn v. Burke*, supra, is directly in point and controls decision of the present petition for writ of habeas corpus. The petitioner was entitled to a hearing before the revocation of his probation.[5]

The petitioner in this case has also claimed that the revocation of his probation without a hearing deprived him of equal protection of the laws. He bases this claim on the allegation that probationers in Milwaukee County are afforded a hearing before the sentencing judge prior to revocation, whereas probationers in the rest of the state may be, and are, revoked summarily by the department with no hearing. In light of *Hahn v. Burke*, supra, requiring a hearing prior to revocation of probation, I need not consider the petitioner's equal protection arguments, and I express no opinion as to their merits.

The petitioner in this case further contends that if he is entitled to a hearing prior to revocation of his probation, he is also entitled to the assistance of counsel at that hearing. The court of appeals in *Hahn* did not deal with this issue in its opinion.

In *Mempa v. Rhay*, 389 U. S. 128, 134 (1967), the Supreme Court stated:

> "* * * appointment of counsel for an indigent is required *at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.* * * *" (Emphasis supplied.)

Mempa involved probation revocation proceedings (hearings which were provided for by statute) in the State of Washington. When a criminal defendant in Washington is placed on probation, sentence is deferred; that is, not imposed until such time, if ever, as probation is revoked. Upon revocation, the sentencing judge is required to administer the maximum sentence to the probationer. However, the judge is also free to make recommendations to the prison authorities as to the actual length of time the probationer should serve upon incarceration. The prison authorities are not required to abide by the

judge's recommendations but, as indicated in *Mempa*, probably often do so. It was in this factural context that the Supreme Court in *Mempa* held that counsel was required at the revocation hearing in Washington. The decision of *McConnell v. Rhay*, 393 U. S. 2 (1968), gave *Mempa* retroactive application.

Many courts have held *Mempa* to be restricted to its narrow factual context only. That is, these courts have expressed the opinion that *Mempa* applies only to probation revocation proceedings where deferred sentencing is involved.[6] In my view, *Mempa* should not be read so narrowly.[7] The fundamental premise of *Mempa* is that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The fact that a previously deferred sentence may be imposed is not the only aspect of probation revocation proceedings which make them a "stage * * * where substantial rights * * * may be affected." Under the state procedure involved in *Mempa*, the previously deferred sentence was imposed only if the outcome of the revocation hearing was that conditions of probation had, in fact, been violated and that, consequently, probation should be revoked. In this connection, there is language in *Mempa* wherein the Supreme Court expresses concern about the nature of the proceeding leading to the decision of whether to revoke probation or not. After noting that appeal in a case involving a guilty plea followed by probation can only be taken after sentence is imposed following revocation, and noting that a plea of guilty may be withdrawn at any time prior to imposition of sentence, the Supreme Court said:

> "The two foregoing factors assume increased significance when it is considered that, as happened in these two cases, *the eventual imposition of sentence* on the prior plea of guilty *is based on the alleged commission of offenses for which the accused is never tried.*" (Emphasis supplied.) Id, at 136-7.

[In *Mempa*, as in the present case, probation was revoked on the basis of *allegations* that the petitioners had committed new offenses.] Substantial rights were potentially affected in *Mempa* not only because of the possibility that sentence would be imposed, but also because the threshold determination as to whether probation should be revoked is often based upon mere allegations of misconduct. I believe that the Supreme Court, through its broad statement about the necessity of counsel at "every stage * * * where substantial rights * * * may be affected," was expressing its concern in *Mempa* for the total nature of the proceeding, not only the sentencing dimension (admittedly the prime emphasis) but also the fact that "the eventual imposition of sentence * * * is based on the alleged commission of offenses for which the accused is never tried."

In Wisconsin, sentence is not legally deferred when a defendant is placed on probation. But in fact, the sentence only becomes effective when probation is revoked. In practice, the distinction between the Wisconsin and Washington procedures is one of form more than one of substance. It is indisputable that "substantial rights" of the probationer are involved at a probation revocation hearing. The probationer's liberty hinges on the outcome of the hearing.

In *Hewett v. North Carolina*, 415 F. 2d 1316 (4th Cir. 1970), the Fourth Circuit Court of Appeals dealt with the issue of counsel at a probation revocation hearing. In North Carolina, a hearing upon revocation of probation was provided for by statute. As in Wisconsin, this hearing did not involve deferred sentencing. Referring to *Mempa v. Rhay*, supra, the *Hewett* Court stated at page 1322:

> "As we read *Mempa* we are persuaded, unlike the majority of the decisions which deny the right to counsel, that it cannot be limited to its narrow factual context. The

principle which undergirds that decision is broad indeed, 'appointment of counsel for an indigent is required at *every stage* of a criminal proceeding where *substantial rights* of a criminal accused may be affected.' * * * While the right to counsel applies to 'criminal proceedings,' we have little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. * * *"

The *Hewett* Court concluded that counsel was required at probation revocation hearings in North Carolina even though deferred sentencing was not involved.

The respondent in this case maintains that there is no right to the assistance of counsel and relies for that contention on *Brown v. Warden, U. S. Penitentiary,* 351 F. 2d 564 (7th Cir. 1965). In *Brown,* the Seventh Circuit dealt with the issue of counsel at a federal probation revocation hearing and found that in that case counsel was not required. The *Brown* case dealt with federal probation and involved a situation wherein the probationer had been *convicted* of a new offense before the revocation hearing. The court stressed the fact that the petitioner in *Brown* had not requested the assistance of counsel and did not deny the violation of his probation conditions. More importantly, however, since *Brown* was decided, the decisions in *Mempa* and *Hahn* have intervened. The *Brown* court relied heavily on the privilege-right distinction and referred in that regard to *Escoe v. Zerbst,* supra. In *Hahn,* the Seventh Circuit stated that the privilege-right dicta from *Escoe* had "all but been obliterated" by recent United States Supreme Court opinions. In my view, the Supreme Court holding in *Mempa* with regard to the necessity of counsel at "every stage" of a criminal proceeding where "substantial rights" may be affected, and the *Hahn* decision taken as a whole, undercut the basis of the holding in *Brown*

sufficiently so that it need not be viewed as controlling the decision of the present issue.[8]

I find the probation revocation hearings in Wisconsin, provided for in *Hahn v. Burke*, supra, to be proceedings where "substantial rights" are unquestionably affected. Therefore, I find that the assistance of counsel is required at these hearings.

Finally, there is the question of what *type* of hearing is required. The court in *Hahn* held that "fundamental constitutional requirements of due process necessitate a *limited* hearing prior to a probation revocation." (Emphasis supplied.) The court then stated in a footnote:

> "[8]This is not to deny that probationers could not be detained where circumstances required and a hearing was not immediately possible. We need not now explore the specific procedural characteristics which revocation must have."

The court then concluded its opinion by stating:

> "For the foregoing reasons, we hold petitioner's probation revocation to be a nullity and therefore reverse and remand to the district court with directions to expunge the revocation from petitioner's record. The Wisconsin court may, however, hold a probation revocation hearing at this time if it has jurisdiction over probationer."

The quotation above, referring to "The Wisconsin court," is an indication that *Hahn* court was requiring judicial hearings prior to revocation. However, this reference is the only mention made in the opinion in this regard. The issue of whether hearings prior to probation revocation in Wisconsin should be administrative or judicial has not been an issue in this case. I do not now attempt to decide the issue of the precise character and form of the hearings

now required in Wisconsin beyond what is indicated by the opinion in *Hahn v. Burke*.

The foregoing opinion constitutes this court's findings of fact and conclusions of law in accordance with Rule 52 (a) of the Federal Rules of Civil Procedure.

For the purpose of the present petition for writ of habeas corpus,

IT IS ORDERED:

1. That petitioner's probation revocation be and it hereby is adjudged to be a nullity, and respondent is directed to expunge it from the petitioner's records.

2. That the application for writ of habeas corpus be granted, and that the issuance of the writ be stayed for a period of thirty days from the date of this order to enable the Wisconsin court to hold a hearing on petitioner's probation revocation, if it so desires. If a hearing is held, the petitioner is entitled to the assistance of counsel. If such a hearing is not held within the designated time, the writ will be issued.

Dated at Milwaukee, Wisconsin, this *21st* day of September, 1970.

John W. Reynolds
U.S. District Judge

FOOTNOTES

1. See Wisconsin Statutes, § 57.01, et seq.

2. See Wisconsin Statutes, § 57.13.

3. See Cohen, *Sentencing, Probation and the Rehabilitative Ideal; The View from Mempa v. Rhay*, 47 Tex. L. Rev. 1 (1968); Bassett, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, Journal of Crim. Law, Crim. & Pol. Sci., Vol. 80, No. 4, Pg. 479 (1969); Benjamin, *Due Process and Revocation of Conditional Liberty*, 12 Wayne L. Rev. 638 (1966); Comment: *Right to Counsel-State Courts Split on Probationer's Right to Counsel at Revocation Hearing*, 42 N.Y.U.L. Rev. 955 (1967); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 Jour. Crim. Law, Crim. & Pol. Sci. 175 (1964); Note, *Legal Aspects of Probation Revocation*, 59 Colum. L. Rev. 311 (1959). See also: *Federal Rules of Criminal Procedure*, Rule 33 (f), providing for hearing in federal probation revocation; *Report of the President's Commission on Law Enforcement and the Administration of Justice*—Task Force Report: *Corrections*, page 88, calling for hearing and the appointment of counsel for probation revocation; *ALI Model Penal Code*, § 301.4 (1962), calling for notice and hearing before revocation; *ABA Standards for the Administration of Criminal Justice*, § 5.4, 7 CrL 3079 and 7 CrL 2418; *Study Draft of New Federal Criminal Code*, June 8, 1970, § 3104 (2) at 277-78.

4. Wisconsin Statutes, § 57.03 (1), provides for the revocation of probation without a hearing in that the department is empowered, where the probationer has already been sentenced, to transport him directly to prison.

5. See also *Marquardt v. Gagnon* (No. 70-C-67, E.D. Wis., August 31, 1970).

6. *Bishop v. Brierly*, 288 F. Supp. 401 (E.D. Pa. 1968); *Holder v. United States*, 285 F. Supp. 380 (E.D. Tex. 1968); *Sammons v. United States*, 285 F. Supp. 100 (S.D. Tex. 1968); *United States v. Hartsell*, 277 F. Supp. 993 (E.D. Tenn. 1967); *Trautsch v. Gagnon* (No. 68-C-108, W.D. Wis. 1968—unpublished opinion).

7. For other cases holding or suggesting that *Mempa* applies to probation revocation proceedings even in the absence of deferred sentencing, see *Hewett v. North Carolina*, 415 F. 2d 1316 (4th Cir. 1969); *Ashworth v. United States*, 391 F. 2d 245 (6th Cir. 1968); *Peinado v. Adult Authority of Department of Corrections*, 405 F. 2d 1185 (9th Cir. 1969); *Shone v. State of Maine*, 406 F. 2d 844, at n. 13 (1st Cir. 1969); *State v. Seymour*, 237 A. 2d 900 (N.J. App. Div. 1968); *Commonwealth v. Tenson*, 4 CrL 2351 (Pa. S.Ct. Jan. 15, 1969).

8. See also *Ashworth v. United States*, 391 F. 2d 245 (6th Cir. 1968).

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18523 JAMES C. GUNSOLUS, *Petitioner-Appellant,* v. JOHN R. GAGNON, Warden, *Respondent-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 69-C-617 ROBERT E. TEHAN, *Judge.*
Nos. 18501, 18502 VERN LEVI FINK and THOMAS F. HOPPE, *Petitioners-Appellants,* v. ELMER O. CADY, Warden, *Respondent-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin. Nos. 69-C-547 & 69-C-606 KENNETH P. GRUBB, *Judge.*
No. 18875 GERALD H. SCARPELLI, *Petitioner-Appellee,* v. JOHN R. GAGNON, Warden, *Respondent-Appellant.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 68-C-387 JOHN W. REYNOLDS, *Judge.*

December 28, 1971

Before FAIRCHILD and SPRECHER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.*[1]

[1] Honorable William J. Campbell, Senior District Judge, Northern District of Illinois, is sitting by designation.

FAIRCHILD, *Circuit Judge.* These consolidated appeals raise several questions of importance concerning the probation revocation process in Wisconsin. In *Hahn* v. *Burke*, 430 F2d 100 (7th Cir., 1970), cert. den. 402 U.S. 933, this court held that "basic requirements of due process entitle a probationer to a hearing before his probation is revoked." These appeals present the related issues of (1) whether *Hahn* should be applied retroactively, (2) whether the probation revocation hearing must be judicial, or whether an administrative hearing will suffice, (3) whether retained counsel must be allowed to participate in the probation revocation hearing, and (4) whether indigents are entitled to the appointment of counsel to assist them at the hearing.

The basic factual pattern with respect to all four petitioners involved in the instant appeals is as follows: Petitioners were convicted of felonies in various Wisconsin courts outside of Milwaukee county and sentenced to terms of imprisonment. Execution of sentence was stayed and petitioners placed on probation in the custody of the Wisconsin Department of Health and Social Services. Each petitioner was alleged later to have committed some act or acts which violated a condition of his probation. Thereupon, the department revoked probation and petitioners were incarcerated to serve the full term of the sentence previously imposed. No hearing was conducted for any petitioner before probation was revoked. Revocation of probation with respect to all petitioners occurred prior to our ruling in *Hahn*. Each petitioner exhausted his state habeas corpus remedies and then sought federal habeas corpus. Each federal petition was filed prior to our ruling in *Hahn*. The district court denied the petitions of petitioners Fink, Hoppe, and Gunsolus in orders which pre-dated *Hahn*. In the case of Scarpelli, the district court ruled, after our decision in *Hahn*, that petitioner was entitled to a hearing prior to probation revocation and entitled to appointment of counsel for such hearing. The district court opinion is reported at 317 FSupp. 72 (E.D. Wis., 1970).

Nos. 18501 and 18502, Fink and Hoppe

In April, 1969 petitioners Fink and Hoppe were convicted of burglary and sentenced to indeterminate terms

of not more than 4 and 3 years respectively. Execution of sentence was stayed and petitioners placed on probation to the department. As one condition of probation, each petitioner was to remain in the custody of the sheriff for one year during the time he was not employed. During this year, the department decided that each had violated this condition by absenting himself from jail "under deceptive and improper circumstances." Thereupon the department revoked probation.

No. 18523, Gunsolus.

Petitioner Gunsolus was convicted of theft and sentenced to a term of not more than 3 years imprisonment. Execution of the sentence was stayed and petitioner placed on probation for a period of 2 years, upon the condition, inter alia, that he spend his non-working hours in jail for the first six months. During this period the department decided that petitioner had absconded, and revoked probation.

No. 18875, Scarpelli.

In July, 1965 petitioner Scarpelli was convicted of armed robbery and sentenced to imprisonment for an indeterminate term not to exceed 15 years. Execution of the sentence was stayed and petitioner placed on probation for a period of 7 years. In September, 1965, the department decided that he had associated with known criminals and had been involved in a burglary. The department revoked probation. At the time of the filing of his petition for writ of habeas corpus, petitioner was incarcerated in a Wisconsin prison. On June 4, 1969 petitioner was paroled to a federal detainer. Petitioner is thus currently a parolee of the state of Wisconsin incarcerated in a federal prison. We agree with the district court that petitioner's parole does not moot this petition.

Retroactivity of Hahn v. *Burke.*

In *Hahn* v. *Burke* we held that constitutional dictates of due process require a state to hold a hearing before revoking probation. The state urges us to limit the effect of this holding to only those probation revocations which occur after the date of *Hahn*, August 19, 1970.

In *Stovall* v. *Denno*[3], the Supreme Court listed the criteria for determining the extent to which changed interpretations of the constitution with respect to criminal procedure should be applied retroactively. They are as follows: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of the new standards."

Although *Mempa* v. *Rhay*[4] requiring that counsel be made available at a revocation hearing which culminates in sentencing has been given full retroactive application[5] it does not necessarily follow that the *Hahn* requirement of a revocation hearing where revocation terminates the stay of a sentence already imposed must be retroactively applied.

On April 2, 1971, the Supreme Court of Wisconsin decided *State ex rel. Johnson* v. *Cady*[6], and held that there is a right to a hearing on revocation of probation (and of parole as well). On the question of retroactivity, the Court evaluated the situation in terms of *Stovall* criteria, and determined "that the hearing granted by this decision shall be prospective only except as to those petitions on file in this court or any trial court in the state as of the date of this mandate."[7] We understand "on file" to mean pending, and to exclude petitions previously filed, denied, and beyond direct review. If we misconstrue the phrase, then present petitioners, who presented petitions to state courts long ago, would only have to go back to state court to receive the benefit of *Johnson*.

We are not prepared to disagree with the evaluation by the Wisconsin Court of the various factors, leading to its conclusion that full retroactivity for *Hahn* is inappropriate. If we were so to decide similarly, the normal pattern would be to limit the *Hahn* decision to prospective effect except that it would be applied to Hahn himself. It is the doctrine of *Stovall*, p. 301, that if full retro-

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[3] 388 U.S. 293, 297 (1967).
[4] 389 U.S. 128 (1967).
[5] *McConnell* v. *Rhay*, 393 U.S. 2 (1968).
[6] 50 Wis2d 540, 185 NW2d 306.
[7] 50 Wis2d 558.

activity be deemed inappropriate, the arguable inequity, to other petitioners similarly situated, of applying the new rule to the party in the case in which the new rule is announced, and the fact that he is a chance beneficiary of the new rule, are not adequate reasons for applying the new rule retroactively to all who have already brought their cases to court.

Our present situation has, however, unusual elements. The dates of the *Hahn* and *Johnson* decisions, rejecting ex parte revocations of probation, are different. *Johnson* is to be applied retroactively to a limited class of persons other than the *Johnson* petitioners in order to avoid inequity to that class. And those who properly raise the challenge in federal courts necessarily have previously pursued it in state courts.

We do not attempt to pose and analyze all the hypothetical situations in which a purely prospective *Hahn*, side by side with a limited retroactivity for *Johnson*, would cause some degree of inequity. There would exist one glaring inequity, however, among Wisconsin prisoners whose probation was revoked ex parte before the date of *Hahn*. Those whose state court petitions were still pending by the date of *Johnson*, either because filed later, perhaps relying on *Hahn*, or because more slowly processed, would get the benefit of the new rule by virtue of *Johnson's* retroactivity formula. Those who filed in state court earlier and whose petitions were denied more promptly, and who brought their claim to the federal district court before the date of *Hahn*, would not, except for Hahn himself, get such benefit.

We think that under the facts peculiar to this case, *Stovall* does not prevent our considering the inequity just referred to, and making *Hahn* retroactive to the limited extent necessary to avoid it. Therefore we hold that *Hahn* is retroactive at least so as to apply to all who, having exhausted state remedies, had filed petitions in federal district court before August 19, 1970 raising the claim here involved, which petitions had not been denied, or if denied, were still open to direct review. *Hahn* would thus be applied to petitioners in this case. Whether there is sound reason for according full retro-

activity to *Hahn* would better be considered when the facts presented make it necessary squarely to face and decide the question.

Whether the revocation hearing may be administrative rather than judicial.

As to all courts in Wisconsin except those in Milwaukee county, the statutes provide that a person placed on probation shall be in the custody of the state's department of health and social services.[7] It is the department, rather than the court, which revokes probation for violation of a condition. In cases like petitioners', where the court has already imposed sentence, the department orders the probationer to prison and his sentence begins. In cases where the court has withheld sentence, the department orders him brought before the court for sentencing.[8] In counties exceeding 500,000 population, *i.e.*, Milwaukee, the statutes provide that the probation department of the respective court shall have custody of probationers, and "Probation violators whether sentenced or not, shall be taken before the court for a hearing."[9]

Thus the finding that a violation had occurred and the decision that probation be revoked was made by an administrative officer in petitioners' cases. *Hahn* has already decided that these administrative decisions were invalid because of lack of hearing. We understand that in revocations since *Hahn*, the department has continued to make the decisions in cases where probationers are in its custody, as the statute requires, except that a hearing is now held (though counsel is excluded). The question will now arise in the present cases whether, if the revocation proceeding is to be revived, an administrative hearing, fulfilling due process standards, will suffice. Petitioners contend that an administrative hearing and determination on the question of revocation is either inadequate, as a matter of due process, or in any event a denial of equal protection of the laws, since persons placed on probation by Milwaukee courts are given a judicial hearing.

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[7] §973.09, Wis. Stats.
[8] §973.10, Wis. Stats.
[9] §973.11(5), Wis. Stats.

In *Hahn*, the decision to revoke was also administrative, but these issues seem not to have been raised, and were not discussed in the opinion. We conclude that no answer to these questions was implied by the reference in the last sentence of the *Hahn* opinion to "court" rather than "department."

Assuming that the department follows a hearing procedure which otherwise fulfills due process standards (and, as will be seen, we think counsel is required), we think there is no reason to fault it because carried out by administrative personnel rather than by a judge. And we find no other constitutional provision which expressly or by implication requires that revocation of probation be accomplished within the judicial department.

Petitioners' equal protection claim rests upon the proposition that classification of probationers according to the population of the county in which the convicting court sits can not be sustained where members of one class charged with violation receive a hearing before a judge and members of the other a hearing before an administrative officer. The Supreme Court of Wisconsin has decided that territorial uniformity is not required and that this difference in procedure does not deny equal protection.[10] We agree that the basis of the classification is not inherently invidious.

Moreover, considering the cases, like petitioners', where sentence has already been imposed, it does not appear that the courts in Milwaukee county have power to act in significant ways beneficial to alleged probation violators which the department lacks. The statutes do not expressly authorize the courts to reduce previously imposed sentences in connection with revocation of probation. If, indeed, the courts in Milwaukee county make a practice of doing so, no showing of that fact has been presented.

Any court which has placed a defendant on probation may at any time prior to the expiration of the probation period extend the period of the probation or modify its terms and conditions.[11] Any court which has imposed a

[10] *Johnson, supra*, note 5, 50 Wis2d 553.

[11] Sec. 973.09(3), Wis. Stats.

sentence may modify it upon motion made within ninety days.[13] The fact that a court in Milwaukee county might employ either of these powers in connection with a proceeding to revoke probation, while the department could do no more than recommend such action to the court of conviction, if located elsewhere, does not, in our opinion, raise a sufficient difference so that probationers are denied equal protection.

Presence of retained counsel.

We have no difficulty in recognizing the significance of the probationer's stake in a revocation hearing, such that counsel obtained by the probationer must be admitted to the hearing and permitted to represent his client.[15]

Right to counsel, furnished if necessary.

Petitioners contend, and the district court in *Scarpelli*[14] held that indigent probationers are entitled to the appointment of counsel to assist them at probation revocation.

The district court relied on *Mempa* v. *Rhay*,[16] adopting the view that when sentence is imposed, as well as when imposition is stayed, and defendant is placed on probation, the criminal proceeding extends beyond sentencing into the probationary period so that a proceeding to revoke probation is still a stage of it, and a stage, of course, where substantial rights may be affected. The same interpretation of *Mempa* was stated in *Hewett* v. *State of North Carolina* on the ground that "[e]ven if a new sentence is not imposed, [revocation] is the event which makes operative the loss of liberty."[16] The Court of Appeals of New York has said that "[t]he principle which underlies the decision in *Mempa* is sufficiently broad to encompass the revocation of parole as well as of probation."[17]

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[13] *Hayes* v. *State*, 46 Wis2d 93 (1971).

[14] *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970).

[14] *Scarpelli* v. *Gagnon*, 317 FSupp. 72 (E.D.Wis., 1970).

[15] 389 U.S. 128 (1967).

[16] 415 F2d 1216, 1222 (4th Cir., 1969).

[17] *People ex rel. Menechino* v. *Warden, Green Haven St. Pris.*, 27 NY2d 376, 267 NE2d 238, 241 (1971).

With all respect[18] it seems to us that the rationale stated by the Supreme Court for its result in *Mempa* should be considered in deciding how far *Mempa* reaches. It seems to us that the Court quite carefully limited its application of a sixth amendment right to counsel at revocation of probation to a situation in which the criminal proceeding by reason of the deferment of sentencing could logically be deemed incomplete, and in which the imposition of sentence, coupled with revocation, could readily be said to be a stage of such proceeding. Almost a year after *Mempa*, in deciding that *Mempa* has full retroactive effect, the Court referred to it as deciding that sixth amendment rights had been violated at "deferred sentencing hearings", and twice characterized the right involved as "[t]he right to counsel at sentencing."[19] Surely a probation revocation proceeding affects substantial rights of a probationer even where the sentence has already been imposed, but we do not think that *Mempa*, with its emphasis on sentencing, held that every probation revocation is a stage of a criminal proceeding nor that, for this purpose, the entire range of the correctional process after sentencing is a part of the criminal proceeding.

In *Hahn*, sentence had been imposed at the time Hahn was placed on probation. This court, in deciding that Hahn's probation could not constitutionally be revoked without a hearing did not rely on *Mempa* nor say that the revocation was a stage of the criminal proceeding. Rather it concluded that the loss of the freedom (albeit somewhat restricted) enjoyed by a probationer was grievous, and, after weighing it against the governmental interest involved, "that fundamental constitutional requirements of due process necessitate a limited hearing prior to a probation revocation."[20] We think the same due process requirements lead to the conclusion that counsel must be made available.[21]

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[18] Opinions variously construing *Mempa* have been most recently collated in Dyke, "Parole Revocation Hearings in California: The Right to Counsel," 59 Cal.L. Rev. 1215 (1971).

[19] *McConnell*, *supra*, note 4.

[20] 430 F2d 105.

[21] Decisions dealing with parole revocations and reaching a similar conclusion in that setting are: *People ex rel. Menechino* v. *Warden, Green Haven St. Pris.*, *supra*, note 17, 267 NE2d 242; *United States ex*

The Supreme Court has, at least twice, decided that in proceedings where personal liberty is at stake, but which do not, or may not, constitute criminal proceedings, the due process clause of the fourteenth amendment compels the state to make counsel available. *In re Gault*, 387 U.S. 1, 41 (1967), a proceeding to determine delinquency of a child. *Specht* v. *Patterson*, 386 U.S. 604, 608 (1967), a proceeding under a sex offenders act "whether denominated civil or criminal."

The vast importance of revocation to the probationer is clear. It is immediately measured by the difference between confinement in an institution and freedom to live a normal life, though restricted in some degree by conditions of probation. As pointed out in *Hahn*, p. 102, it affixes a permanent blemish to his record. Whether assistance of counsel at the revocation proceeding is essential to fundamental fairness turns on the function counsel may be expected to perform. Granting that the scope of the revocation hearing is limited and that the procedure need not be formal, the ability of counsel to direct, amplify, and promote the flow of information is nevertheless of real significance.

Violation of a condition of probation is prerequisite to revocation. Thus there is likely to be an issue of fact, in the just determination of which counsel can afford help.[22] Development of other information, bearing upon the exercise of discretion whether to revoke or merely warn for proved misconduct, would usually be an important role for counsel.

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[21] (Continued)
rel. *Bey* v. *Connecticut State Bd. of Par.*, 443 F2d 1079 (2d Cir., 1971), judgment vacated and cause remanded for dismissal as moot, 40 L.W. 3181; *Warren* v. *Michigan Parole Board*, 23 Mich. App. 754, 179 NW2d 664 (1970); *Goolsby* v. *Gagnon*, 322 FSupp. 460, 466 (E.D.Wis., 1971). Contra: *Bearden* v. *South Carolina*, 443 F2d 1090, 1093 (4th Cir., 1971); *Morrissey* v. *Brewer*, 443 F2d 942, 950 (8th Cir., 1971); *In re Tucker*, 95 Cal. Rptr. 761, 488 P2d 657 (1971).

[22] "The probation revocation proceeding, in other words, involves exactly the same kind of problem as is involved in the criminal trial itself . . . the ascertainment of historical events about which there may be some dispute and the consideration of those events against a standard of conduct to which the probationer is expected to adhere. The inability of the lay-probationer to adequately protect himself in such a context would seem just as pronounced as it is at the trial itself." A.B.A. Standards, "Probation," Tentative Draft, p. 69.

Recognizing the potential issues of fact and the scope of facts in mitigation or otherwise influential in a favorable exercise of discretion, we think that in order for the hearing, found necessary in *Hahn*, to be meaningful, the assistance of counsel must be available. As stated by the Supreme Court in *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

Brown v. *Warden, U.S. Penitentiary*[33] is a 1965 decision of this court, holding that counsel need not be afforded at a probation revocation hearing in a federal court. *Brown* preceded many of the recent cases involving this subject. Since a hearing had been afforded, *Brown* was not concerned with the question whether a hearing was constitutionally required. The sentence had already been imposed, and we do not, under our view of *Mempa*, find that *Brown* was overruled by *Mempa*. Because, however, we conclude that counsel was required in order to fulfill due process, we now overrule *Brown* insofar as it holds the contrary.[34]

In No. 18875, *Scarpelli*, the judgment is affirmed. In Nos. 18501, *Fink*, 18502, *Hoppe*, and 18523, *Gunsolus*, the judgments are reversed and the causes remanded to the district court with directions to order release from confinement and reinstatement of probation unless, within a short but reasonable interval, to be fixed by the district court, a new revocation is ordered, after a hearing consistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

[33] 351 F2d 564 (1965).

[34] This opinion has been circulated among all the judges of this court in regular active service, and a majority has voted not to rehear in banc the question of overruling *Brown*.

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